Supreme Court, U.S.
FILED

(1)

No. A-93 96 146 JUL 2 2 1996

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

James R. King,
Appellant,

vs.

State Board of Elections, *et al.*

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

James C. Ten Broeck, Jr.
Counsel of Record
536 West Erie Street
Suite 200
Chicago, Illinois 60610
(312) 337-9639

Of Counsel:
Douglas E. Markham
333 Clay
Suite 4510
P.O. Box 130923
Houston, Texas 77219

Joseph A. Morris
The Lincoln Legal Foundation
100 West Monroe Street
Suite 1600
Chicago, Illinois 60603

38 pp

QUESTIONS PRESENTED

1. Where the Challenged District was Created by a Prior Court's Decision and the Lower Court Found that the Challenged District was a Race-Based Classification, was the Lower Court Exempt from Applying Strict Scrutiny to the Challenged District?

2. Where a Congressional, Court-Ordered Districting Plan is Found to be Bizarre and Uncouth on the Basis of Race, Can it be Found to be a Narrowly Tailored Remedy under §2 of the Voting Rights Act, Presuming that there was a Violation?

3. Was There a Strong Basis in Evidence for a Federal District Court to uphold a Racial Gerrymander pursuant to the Equal Protection Clause?

LIST OF PARTIES

Plaintiff

James R. King

Defendants

State Board of Elections
David E. Murray
Lawrence E. Johnson
Hannelore Huisman
Judith Jones
Langdon D. Neal
Theresa M. Petrone
Wanda Rednour

Defendant Intervenors

Bobby Rush
Timuel Black
Al Johnson
Elvira Carrizales
Neomi Hernandez
The Chicago Urban League

United States

TABLE OF CONTENTS

Questions Presented i
List of Parties ii
Table of Contents iii
Table of Authorities v
Basis of Jurisdiction 1
Constitutional & Statutory Provisions Involved 1
Statement of the Case 1
Argument 5

I. Where the Challenged District was Created by a Prior Court's Decision and the Lower Court Found that the Challenged District was a Race-Based Classification, was the Lower Court Exempt from Applying Strict Scrutiny to the Challenged District? 5

A. The Lower Court Erred in Applying Strict Scrutiny to the Decision of Hastert, not to the Congressional Districting Plan itself. 5

B. The Lower Court Committed Error in Holding the Plaintiff to an Improper Standard of Review of the Facts and Law. 6

1. King's Claim was not an Impermissible Collateral Attack upon the Hastert Decision..... 7

2. Where There is No Collateral Estoppel, Findings of Fact Are Not Binding..... 8

C. Court Erred in Failing to Shift the Burden of Production to the Defendants and Defendant-Intervenors.. 10

D. Judicial Notice of Facts in Hastert Case..... 11

2. Where a Congressional, Court-Ordered Districting Plan is Found to be Bizarre and Uncouth on the Basis of Race, Can it be Found to be a Narrowly Tailored Remedy under §2 of the Voting Rights Act, Presuming that there was a Violation? 12

A. "Raggedness" of the Boundary 13

B. The Northern & Southern "Appendages". 13

C. The "Western Connector" 14

D. Violation of Traditional Districting Principles: Splitting of Political Subdivisions..... 15

E. Failure to Justify the Rejection of Alternative Remedies. 16

3. Was There a Strong Basis in Evidence for a Federal District Court to Uphold a Racial Gerrymander pursuant to the Equal Protection Clause? 19

A. "Strong Basis in Evidence" Requires that a Court Find that There Has Been a Violation of Federal Law Before Engaging in Remedial Districting under §2 of the Voting Rights Act. 19

B. The Lower Court's Findings of Past Discrimination Fail to Support a Compelling State Interest. 23

C. There Was No Compelling Interest to Justify the Fourth Congressional District by way of Other Section 2 Districts. 25

D. The Lower Court Clearly Erred in Failing to Find, as a Matter of Fact, that Fewer than 50% of the Adult Citizens in the Challenged District in 1990 Were Hispanic. 26

E. Hispanic Population Was Not Geographically Compact to Justify the Creation of a §2 Remedial District. 28

Conclusion 29

TABLE OF AUTHORITIES

Adarand Constructors, Inc. v. Pena, ___ U.S. ___, 115 S.Ct. 2097 (1995) 29

Baird v. Consolidated City of Indianapolis, 976 F.2d 357, (1992), *cert. denied* ___ U.S. ___, 113 S.Ct. 2334 (1993) 20

Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985) 8, 10, 11

Bowman v. City of Franklin, 980 F.2d 1104, (7th Cir. 1992) 10

Bush v. Vera, ___ U.S. ___, ___ S.Ct. ___, (1996 WL 315857) 12, 13, 19, 22, 26

Campos v. City of Houston, 894 F.Supp. 1062, (S.D. Tex. 1995, *appeal pending*) 27

City of Richmond v. Croson, 488 U.S. 469, 109 S.Ct. 706, (1989) 16

Connor v. Finch, 431 U.S. 407, 97 S.Ct. 1828 11

DeWitt v. Wilson, 856 F.Supp. 1409 (1994), *affirmed*, ____ U.S. ___, ___ S.Ct.____ 21

Fabricus v. Freeman, 466 F.2d 689, (7th Cir. 1972) 6

Gilbert v. Ben-Asher, 900 F.2d 1407, (9th Cir. 1990) 8

Green v. Warden, U.S. Penitentiary, 699 F.2d 364 (7th Cir.), *cert. denied* 461 U.S. 960, 103 S.Ct. 2436 (1983) 11

Growe v. Emison, 507 U.S. 25, 113 S.Ct. 1075 (1993) 20, 27

Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, (1940) 8

Hastert v. State Bd. of Elections, 777 F.Supp. 634 (N.D. Ill. 1991) 12

Hays v. State of Louisiana, 839 F.Supp. 1188, (W.D. La. 1993) 14

Holloway v. A.L. Lockhart, 813 F.2d 874 (8th Cir. 1987) 8

Jackson v. DeSoto Parish School Bd., 585 F.2d 726, (5th Cir. 1978) 8

Johnson v. DeGrandy, 512 U.S. ___, 114 S.Ct. 2647 (1994) 13, 26

Litchfield v. Crane, 123 U.S. 549, ___ S.Ct. 210 (1887) 10

LULAC v. North East Independent School District, 903 F.Supp. 1071, (1995) 27

Martin v. Wilks, 490 U.S. 755, 109 S.Ct. 2180, *reh.den.* 110 S.Ct. 11 (1989) 7, 8, 9, 10

Miller v. Johnson, 515 U.S. ___, 115 S.Ct. 2475, 2490 (1995) 10, 29

Missouri v. Jenkins, ___ U.S. ___, ___, 115 S.Ct. 2038 (1995) 20

Otherson v. Department of Justice, I.N.S., 711 F.2d 267, 274 (D.C. Cir. 1983) 9

Philips Medical Sys. Int'l, B.V. v. Bruetman, 982 F.2d 211 (7th Cir. 1992) 11

Prymer v. Ogden, 29 F.3d 1208, (7th Cir. 1994) 8

Romero v. City of Pomona, 883 F.2d 1418, (9th Cir. 1989) 27

Rybicki v. State Board of Elections, 574 F.Supp 1082 (N.D.Ill.1982) 24

Schrage v. State Bd. of Elections, 88 Ill.2d 87, 430 N.E.2d 483, (1981) 12

Shaw v. Hunt, ___ U.S. ___, ___ S.Ct. ___ (1996 WL 315870) 12, 16, 17, 18, 19, 26

Shaw v. Reno, 509 U.S. 630, ___, 113 S.Ct. 2816, 2832 (1993) 19,21, 23, 30

Skorepa v. City of Chula Vista, 723 F.Supp. 1384, (S.D.Cal. 1989) 27

Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752 (1986) 21, 22, 26

U.S. v. Paradise, 480 U.S. 149, 107 S.Ct. 1053 (1987) 16, 17

United States v. International Bldg. Co., 345 U.S. 502, 73 S.Ct. 807, (1953) 9

United States v. Young, 804 F.2d 116, (8th Cir. 1986) 9

Upham v. Seamon, 456 U.S. 37, 102 S.Ct. 1518, (1982) 11, 20

Voinivich v. Quilter, 507 U.S. 146, 113 S.Ct. 1149, 1156 (1993) 20

Wise v. Lipscomb, 437 U.S. 535, 98 S.Ct. 2493 (1978) 11

STATUTES:

Illinois Compiled Statutes Ch. 10, Sec. 5/11-3 (West 1994) 15

Illinois Compiled Statutes, Ch. 735, Sec. 5/8-910 (West 1994) 16

Voting Rights Act, 42 U.S.C. §1973, Sec. 2(b) (1994) 21

MISCELLANEOUS:

18 *Wright, Miller, & Cooper* §4449 (1981) 8

Restatement of the Law (Second), Judgments, §27 comment e 20

BASIS OF JURISDICTION

The District Court for the Northern District of Illinois entered the Order in this cause on March 13, 1996, denying the Plaintiffs request for temporary and permanent injunctive relief. The Plaintiff files this appeal pursuant to 28 U.S.C. Sec. 1253, Direct Appeals from Decisions of Three-Judge Courts. Plaintiff's Notice of Appeal was filed on March 22, 1996. Notice of Appeal, Appendix, 1.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The United States Constitution provides at Article III, Section 2 that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ...; [and] to Controversies . . . ."

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.". The relevant statutory provision is section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Sec. 1973, the pertinent parts of which are reproduced at Appendix, 72.

Illinois State Statutory law on Precincts, Illinois Compiled Statutes, 735 ILCS Ch. 5/11-2, et seq., is reproduced at Appendix, 74.

STATEMENT OF THE CASE

A. Prior Congressional Redistricting: *Hastert et al. v. State Board of Elections.*

1. History

The current congressional districting map, upheld in the instant case by the lower court, was, in 1991, court-ordered and approved by the United States District Court for the Northern District of Illinois, Eastern Division in 1991 in the decision of *Hastert et al. v. State Board of Elections*, 777 F.Supp. 634 (N.D.Ill. 1991). At the time that *Hastert* was initiated, the recently released 1990 census data indicated that the State of Illinois was to lose two congressional seats due to a comparative decline in population growth. *Id.* at 638. The Illinois legislature was charged with implementing a

congressional districting plan by June 30, 1990. *Id.* at 638. It failed to do so, and various Democratic and Republican party members initiated the *Hastert* action for congressional redistricting due to the population changes. Shortly thereafter, a group of Hispanic and African-American voters filed an action which, in addition to seeking relief relating to population changes, sought the creation of an Hispanic majority congressional district under §2 of the Voting Rights Act. *Id.* The cases were consolidated along with other plaintiffs who were seeking relief from the 1981 congressional districting plan. *Id.*

Throughout the proceedings, all the parties to the *Hastert* litigation agreed that the "population and demographic changes within the City of Chicago from 1980 to 1990 mandated the creation of an Hispanic majority district." *Id.* at 640. The *Hastert* court also said that "[i]ndeed, an agreement on this issue [the creation of an Hispanic majority district] may be the crucial factor in facilitating the creation of an Hispanic district." *Id.* Consequently, the district court in *Hastert* approved the Hispanic portion of the congressional map, relying upon the requirements for making out a Section 2 violation under the Voting Rights Act pursuant to *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986).

2. *Findings of Fact of the* Hastert *court.*

The *Hastert* court found that under the three prerequisites of *Gingles* that the Hispanic District was required in order to avoid a violation under §2 of the Voting Rights Act. The court found, first, that the Hispanic majority within the district was "sufficiently numerous and geographically compact." The court based its findings upon the following evidence:

> (1) "the Hispanic population of Chicago now totals 545,852, and increase of 29.33% over the 1980 count of 422,052."
>
> (2) "Most of the Chicago/Cook County Hispanic population is clustered into two dense enclaves, one on Chicago's near northwest side and another on the near southwest side."
>
> (3) "The two separate Hispanic population clusters are less than a mile from each other at their closest points."
>
> (4) "The separation of the clusters is not indicative of the

existence of two distinct communities, but appears to have occurred as a result of exogenous physical and institutional barriers."

Id. at 649.

The *Hastert* court also found under the second prong of *Gingles* that the Chicago/Cook County Hispanic community is politically cohesive. The court based this finding upon:

(1) "previous adjudications that found the community politically cohesive and which are themselves evidence of a community acting as one to defend against politically discriminatory practices at both the state and local level. *See, Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984)(1982 Chicago aldermanic redistricting plan violates Hispanic rights under Voting Rights Act), *on remand*, 630 F.Supp. 551 (N.D.Ill.1985); *Rybicki v. State Board of Elections*, 574 F.Supp.1082 (N.D.Ill.1982) (three judge panel) (approving Voting Rights Act settlement with Hispanic community regarding 1982 state legislative redistricting)."

(2) "the bloc voting patterns of the community. Single and bivariate regression analysis of voting patterns in Chicago precincts demonstrate significant ethnic bloc voting patterns."

Id. at 650.

Under the third prong of *Gingles*, the court in *Hastert* found that "ethnic bloc voting patterns have thwarted the political interests of the Hispanic community." *Id.* at 650. The court based this upon evidence of "significant ethnic bloc voting patterns", as referred to above, in addition to evidence that "[p]revious judicial findings demonstrating a paucity of Hispanic officials in city and state-wide elected political offices, *see Ketchum*, 740 F.2d at 1406, ..." *Id.* at 650.

The *Hastert* court, upon finding that the proponents of the Hispanic district met the threshold requirements of *Gingles*, also found that they met the requirements under the "totality of the circumstances" test. The *Hastert* court again relied heavily upon *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984) for evidence of the totality of the circumstances factors. In *Hastert* the findings relied upon were:

(1) "the ward map drawn for the Chicago City Council in 1982 impermissibly fractured the Hispanic community and thus diluted Hispanic voting strength";
(2) the "history of discrimination against Chicago Hispanics in housing, education and services, which the court regarded as a cause of historically low Hispanic voter registration and turnout. [Ketchum] 740 F.2d at 1405";
(3) "absence of any Hispanic representatives on the Chicago City Council from 1920 to 1980. Id. at 1406" and
(4) "the Hispanic population also has been adjudged the victim of intentional discrimination in the drawing of certain state legislative districts following the 1980 census. Id.; see also Rybicki v. State Board of Elections, 574 F.Supp. 1082 (N.D.Ill.1982)."

Id. at 650. None of these courts, including *Hastert* and *King*, make a particularized finding of discrimination against Chicago-area Hispanics apart from the failure to prepare election materials in Spanish in 1972. *See, Ketchum*, at 1406. Seediscussion, *infra* at 24.

B. Lower Court's Decision.

The Plaintiff, James R. King, a resident of the Fourth Congressional District ("4th CD"), brought an equal protection challenge in February, 1995. The lower court, two of whose justices presided over the *Hastert* trial, found that the district was bizarre and, in light of the demographics and evidence in *Hastert*, that the court's strict scrutiny would apply. Despite these findings, however, it held that the Plaintiff failed to establish a violation of the Equal Protection clause because he failed to show abuse of discretion by the *Hastert* court when it adopted the present districting plan pursuant to *Thornburg v. Gingles:*

> There is no evidence that the *Hastert* court abused its discretion. . . . [t]his court defers to the *Hastert* court's balancing of these concerns [under *Gingles*] and concludes that it adopted a narrowly tailored plan.

Opinion at 68-69. The lower court adopted this standard of review in light of its deference to the decision of *Hastert*. King objected to this burden being imposed upon him.

The lower court also found that, in respect to the conclusions of law, that the "law of the case doctrine" would apply. Opinion,

Appendix, 17. The Plaintiff again objected to this burden being placed upon him. See, Plaintiff's Pre-Trial Briefs, Appendix, 104, 110.

ARGUMENT

1. Where the Challenged District was Created by a Prior Court's Decision and the Lower Court Found that the Challenged District was a Race-Based Classification, was the Lower Court Exempt from Applying Strict Scrutiny to the Challenged District?

A. The Lower Court Erred in Applying Strict Scrutiny to the Decision of Hastert, not to the Congressional Districting Plan itself.

The lower court properly determined that strict scrutiny should apply; it improperly deferred to the decision of *Hastert*, and consequently failed to apply strict scrutiny to the Fourth Congressional District itself. The lower court, without authority, assumes undue deference towards the *Hastert* decision which has the effect of shielding the challenged district from strict scrutiny:

> This court['s] . . . task is to determine whether a *court-ordered* reapportionment plan is narrowly tailored. As such, it must defer to *Hastert* court's discretion in selecting an appropriate remedy. . . . There is no evidence that the *Hastert* court abused its discretion. Prior to adopting a remedial plan, the court subjected the proposed plans to an exacting constitutional review and determined which plan would provide a better, more complete remedy for the Section 2 violation. . . . Under these circumstances, this court defers to the *Hastert* court's balancing of these concerns and concludes that it adopted a narrowly tailored plan.

Opinion, Appendix, 69 (citations omitted). The court did not apply strict scrutiny to the 4th CD independent of the factual findings and legal conclusions made in *Hastert*.

B. The Lower Court Committed Error in Holding the Plaintiff to an Improper Standard of Review of the Facts and Law.

Further, the lower court imposed a standard of review equivalent to a modification of an order under Federal Rule 60(b):

> Since King's lawsuit is at its very core a challenge to the *Hastert* court's order, this court concluded that King's lack of standing under Rule 60(b) should not determine the standard of review applicable to the *Hastert* court's findings of fact. The court therefore adopted the standards that *would have applied had King sought to modify the Hastert order under Rule 60(b)*. The court also conditionally admitted the Hastert court's findings of fact to promote important interests in finality and judicial economy. . . . To demonstrate that the *Hastert* court erred in making a specific finding of fact, King has to establish that the court committed clear error. *See Fed. R. Civ. P. 52(a)*

Opinion, Appendix, 17 (footnotes omitted) (emphasis added). In footnote 15 the lower court says that it modified the standard:

> This court has slightly modified the standards to comport to the procedural posture of this case, (i.e. King has filed an independent lawsuit rather than a Rule 60(b) motion to vacate or modify the *Hastert* judgment). Accordingly, this court will consider the *Hastert* court's findings of fact conclusive unless King establishes that the *Hastert* court committed clear error in making specific findings of fact or proves by a preponderance of the evidence that the factual circumstances have changed since the issuance of the *Hastert* decision.

Opinion, Appendix, 17, n.15.

Rule 60(b) permits parties to collaterally attack a judgment of the court for a limited set of reasons. The imposition of the standard of clear error, and it concomitant "abuse of discretion" standard are consistent with Rule 60(b) so as to preserve the finality of judgments. Rule 60(b), however, presumes that the person attacking the judgment was a party to the prior proceeding. King was not a party to the prior proceeding of *Hastert*. In the *King* case, therefore, the court makes the false assumption that King is a person collaterally attacking the judgment in *Hastert*. *See*, *Fabricus v. Freeman*, 466 F.2d 689,

693 (7th Cir. 1972) ("Privity is not established by showing that the prior decision involves the same issues of law or fact and will affect the subsequent litigant's rights as judicial precedent")(citation omitted). The lower court did not give the Plaintiff the opportunity to prove, by a preponderance of the evidence, along with the evidence that was admissible from *Hastert*, that the 4th CD was unconstitutional.

1. King's Claim was not an Impermissible Collateral Attack upon the Hastert *Decision.*

Where a person was not a party to a lawsuit, and subsequently files a lawsuit challenging the judgment rendered in that lawsuit, it does not constitute an "impermissible collateral attack" of the prior judgment. *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, *reh.den.* 110 S.Ct. 11 (1989). In *Wilks*, similar to the present litigation, a prior judgment was challenged in a subsequent lawsuit by persons who were not parties to that judgment. *See, Wilks*, at 759-60, S.Ct. at 2183. In rejecting the idea of "impermissible collateral attack" this Court said:

> All agree that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." . . . This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4449 p.417 (1981).

Id. at 761, S.Ct. at 2184 (emphasis added). In the instant case, the Plaintiff is challenging the configuration of the 4th CD as approved in *Hastert*. The Plaintiff, James R. King, filed an independent action, separate and apart from *Hastert*, over three years after that decision was rendered, challenging the 4th CD both on constitutional grounds as well as grounds covered by the *Hastert* court. Indeed, challenging reapportionment schemes under the civil rights laws may be exempt from the rules regarding issue preclusion. "This court has thus been unwilling to bar subsequent challenges to reapportionment schemes, seemingly constitutional when instituted by the court, but apparently inadequate under the rapidly changing jurisprudence of this area."

Jackson v. DeSoto Parish School Bd., 585 F.2d 726, 729 (5th Cir. 1978).

2. *Where There is No Collateral Estoppel, Findings of Fact Are Not Binding*

The standard of review under 60(b) bound the Plaintiff to the factual findings of *Hastert*. Certainly, this was the intent of the court, insofar as it held that in respect to the Plaintiff meeting his burden of proof on the issue of narrow tailoring, that

> [t]here is no evidence that the *Hastert* court abused its discretion. . . . [t]his court defers to the *Hastert* court's balancing of these concerns [under *Gingles*] and concludes that it adopted a narrowly tailored plan.

Opinion, Appendix, 69-70. In order to be bound by factual findings of a prior proceeding, however, collateral estoppel must be found to apply, and where one was not a party, or is not in privity with a party, those factual findings will not be binding. *Holloway v. A.L. Lockhart*, 813 F.2d 874 (8th Cir. 1987), *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985); *accord, Jackson v. DeSoto Parish School Bd., supra*; *see, Martin v. Wilks, supra* at 761, S.Ct. at 2184 ("A judgment or decree among parties to a lawsuit *resolves issues among them*, but it does not conclude the rights of strangers to those proceedings") (emphasis added), *Gilbert v. Ben-Asher*, 900 F.2d 1407, 1410 (9th Cir. 1990) ("As a general matter, only persons who were parties to the prior action may be bound by *the findings* and conclusions of that action") (emphasis added), *and*, 18 *Wright, Miller, & Cooper* §4449 (1981) ("The rule that nonparties cannot be bound by a judgment ordinarily means that the judgment is not even admissible as evidence of the facts found. At the same time, the judgment carries the ordinary precedential weight of stare decisis"); *see, also, Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117 (1940).

In the *King* case, the lower court expressly acknowledged that the Hispanic 4th CD was created by agreement, citing several passages from the *Hastert* decision to that effect. Opinion, Appendix 22-23. In addition, however, in order for the lower court to apply some equivalent of collateral estoppel, the factual issue must be "actually litigated". *See, Prymer v. Ogden*, 29 F.3d 1208, 1212 (7th Cir. 1994). Moreover, "[a] fact established in prior litigation not by judicial resolution, but by stipulation has not been `actually litigated' and

thus is the proper subject of proof in subsequent proceedings." *United States v. Young*, 804 F.2d 116, 118 (8th Cir. 1986), *Otherson v. Department of Justice, I.N.S.*, 711 F.2d 267, 274 (D.C. Cir. 1983); *see, also, United States v. International Bldg. Co.*, 345 U.S. 502, 504-505, 73 S.Ct. 807, 808-809 (1953).

The lower court asserted at footnote 16 that

> [t]he concepts of finality and judicial economy provide a very pragmatic foundation for the standard of review adopted by this court. Since King has brought this lawsuit in his individual capacity rather than on behalf of a certified class, this court's findings of fact would not bind other potential private litigants who are not in privity with King. It is therefore conceivable that these other potential litigants, displeased by this court's ruling, might separately file a series of lawsuits challenging the constitutionality of the Fourth Congressional District.

Opinion, Appendix, 17, n.16. Judicial economy, as a basis for denying a party his day in court, was rejected by this Court in *Martin v. Wilks*, saying that acceptance of this argument

> would require a rewriting rather than an interpretation of the relevant Rules. . . . [W]e are not persuaded that [its] acceptance would lead to a more satisfactory method of handling cases like these. It must be remembered that the alternatives are a duty to intervene based on knowledge, on the one hand, and some form of joinder, as the Rules presently provide, on the other.

Id. at 767, S.Ct. at 2187. This Court also noted that the difficulties from cases in which a party may subsequently challenge it "arise from the nature of the relief sought. . . ." *Id.* Further, where an issue has not actually been litigated, it is also true that

> [t]he interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.

Restatement of the Law (Second), Judgments, §27 comment e. Thus, the court's concern about judicial economy is without basis where the parties in *Hastert* were in agreement on the creation and form of a Hispanic congressional district.

Similar to the court's imposition of the "abuse of discretion" standard in respect to the facts, the court's imposition of the "law of the case" doctrine was also improper for the same reason: King was not a Plaintiff in the *Hastert* case. A party cannot be bound by a prior judgment unless that party has been found to have been a party in the prior case. *See, Martin v. Wilks, supra.*

The proper role for the decision of *Hastert* was that of *stare decisis*, and nothing more. *See, Litchfield v. Crane*, 123 U.S. 549 (1887) ("the [prior] could be used as a judicial precedent in a proceeding against her, but not as a judgment binding on her and conclusive of her rights"), *Bissonette v. Haig*, 776 F.2d 1384, 1390 (8th Cir. 1985) ("[our previous decision] does, however, stand as a binding precedent in this Circuit on the interpretation of the Act"); *Cf., Bowman v. City of Franklin*, 980 F.2d 1104, 1107 (7th Cir. 1992) (Fed.R.App.P. 28(j) and Circuit Rule 28(j) prohibit supplementing with evidence, but not legal authority). *Hastert* has very little *stare decisis* effect upon the claim of King because *Shaw v. Reno* has changed the extent to which race may be used to construct remedial districts under the Voting Rights Act.[1]

C. Court Erred in Failing to Shift the Burden of Production to the Defendants and Defendant-Intervenors.

"To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Miller v. Johnson*, 515 U.S. ___, 115 S.Ct. 2475, 2490 (1995) (citations omitted). The Defendants and Defendant-Intervenors were not required at trial to demonstrate that the 4th CD was narrowly tailored. Despite the lower court's comments on the shifting of the burden (see, Opinion, Appendix, 37 n.36), the lower court makes no mention of the Defendants or

---

1 The lower court says that it found that the *Hastert* court did not consider the issue of whether the use of race was impermissible nor did it consider the issue of compactness. See, Opinion, Appendix 49 (use of race), and 52, n.48 (compactness).

Defendant-Intervenors meeting its burden of production, or otherwise, on narrow tailoring. See, Opinion, Appendix, 61-65. Instead, it imposed the burden of production on Plaintiff. Certainly, where the lower court also applied the equivalent of Rule 60(b) to the facts proven, as discussed, *supra*, the lower court increased the difficulty of the Plaintiff's burden to prove that the 4th CD was not narrowly tailored. Furthermore, this Court has made clear that a Federal Court is under a higher, not lower, standard of review in drafting reapportionment plans. *Wise v. Lipscomb*, 437 U.S. 535, 98 S.Ct. 2493 (1978). *See, Connor v. Finch*, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834; *see, also, Upham v. Seamon*, 456 U.S. 37, 42, 102 S.Ct. 1518, 1521 (1982).

D. Judicial Notice of Facts In Hastert Case.

In distinction to the evidence submitted in *Hastert*, the lower court ordered that the its findings of fact were admitted. According to Federal Rule of Evidence 201, judicial notice is for "facts that are generally known within the territory of the court's jurisdiction or are capable of accurate and ready determination from a source whose accuracy is beyond reasonable doubt." Fed.R.Ev. 201, Appendix 73. *See also, Bissonette v. Haig, supra* at 878-79. Review of the cases cited by the court indicates that it did not distinguish those cases where the party in question was not a party in the prior lawsuit. *See, Philips Medical Sys. Int'l, B.V. v. Bruetman*, 982 F.2d 211 (7th Cir. 1992), *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364 (7th Cir.), *cert. denied* 461 U.S. 960, 103 S.Ct. 2436 (1983) (same). Taking judicial notice of the findings of fact of the *Hastert* case, in addition to the lower court's imposition of the equivalent of Rule 60(b) and its failure to properly consider the burden of production imposed upon the Defendants and Defendant-Intervenors by reason of strict scrutiny, all made it exponentially more difficult for the Plaintiff to meet his burden in this case.

2. Where a Congressional, Court-Ordered Districting Plan is Found to be Bizarre and Uncouth on the Basis of Race, Can it be Found to be a Narrowly Tailored Remedy under §2 of the Voting Rights Act, Presuming that there was a Violation?

In the instant case, the lower court found that

> the only reasonable conclusion that can be drawn from the shape and demographics of the district is that racial considerations predominated over all other factors in the configuration of the Fourth Congressional District.

Opinion, Appendix, 50. The district court also found that the Fourth Congressional District was not compact,[2] and was bizarre and uncouth.[3] Opinion, Appendix, 51 n.48. At the same time, however, the district court concluded that the district was narrowly tailored by the *Hastert* court, despite saying that it would apply strict scrutiny. Opinion, Appendix, 69-70.

The findings by the district court, in conjunction with this Court's opinions in the recently decided cases of *Bush v. Vera*, ___ U.S. ___, ___ S.Ct. ___, (1996 WL 315857) and *Shaw v. Hunt*, ___ U.S.

---

2 Despite the district court saying that "[t]he finding of geographic compactness to satisfy a *Gingles* threshold factor thus does correspond to a separate finding that the Fourth Congressional District was also compact" at note 48, no such explicit finding was made. The court said that pursuant to state law, the Fourth Congressional District is not "visually compact", citing *Schrage v. State Bd. of Elections*, 88 Ill.2d 87, 98, 430 N.E.2d 483, 487 (1981), and that it was not "functionally compact", "unless the court completely discounts the 4.7% of the district's population dispersed throughout the western connector. . . ." Opinion, Appendix, 51, n. 48.

3 Bizarreness of the Fourth Congressional District was also a finding of the *Hastert* court:

> Justice Stevens, in his concurring opinion in *Karcher v. Dagget*, 462 U.S. at 744-65, took aim at the 'bizarre configuration' of New Jersy's 1982 congressional reapportionment plan. We would be remiss if we failed to observe that the proposed Hispanic district agreed to by all parties in the present action makes the 'bizarre' configuration of the *Karcher* congressional district acceptable by comparison. . . . In sum, the district looks not unlike a Rorschach blot turned on its side. Few districts have quite so an extraordinary appearance. *See, generally* Congressional District Atlas: 100th Congress of the United States, United States Department of Commerce Bureau of the Census (1985).

Hastert v. State Bd. of Elections, 777 F.Supp. 634, 648 n.24 (N.D. Ill. 1991).

___, ___ S.Ct. ___ (1996 WL 315870) (*Shaw II*), admit of only one conclusion: the 4th Congressional District is not narrowly tailored because its bizarreness and uncompactness are attributable to race. In *Bush v. Vera, supra*, this Court found that districts which are "bizarre" and "far from compact" are not "narrowly tailored to serve the State's interest in avoiding liability under §2, because §2 does not require a State to create, on predominantly racial lines, a district that is not `reasonably compact'" *Id.*, at ___ U.S. ___, ___ S.Ct. ___ (1996 WL 315857) (citing *Johnson v. DeGrandy*, 512 U.S. ___, 114 S.Ct. 2647 (1994); *see, also, Bush v. Vera* ___ U.S. ___, ___ S.Ct. ___ (1996 WL 315857) (O'Connor concurring) ("districts that are bizarrely shaped and non-compact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, for predominantly racial reasons, are unconstitutional"). Review of the district map shows that there are three aspects to its shape: (1) the "raggedness" of the edges, due to drawing the district at the census block level; (2) what the district court has referred to as the "promontory" or "appendages" on the northernmost and southernmost sides of the district; and, (3) what the court has referred to as the "western connector". See, 4th CD Map, Attachment.

A. "Raggedness" of the Boundary

The district court found that the lines of the Fourth Congressional District follow concentrations of the Hispanic population with "exquisite" detail. Opinion, Appendix, 53. The district court said that the census block data "permitted the map makers to draw the district's boundaries on a block-by-block basis in order to maximize the concentration of Hispanics in the district." Opinion, Appendix, 53-54. The Plaintiff's expert testified to the "raggedness" of the borders, resulting from this exquisite map drawing. See, Cleveland Test., Appendix, 81. These irregularities also created difficulties in campaigning. Torres Test., Appendix 89.

B. The Northern & Southern "Appendages".

The district court found that the two "appendages" or "promontory" points of the 4th CD were drawn on the basis of racial considerations, relying upon the *Hastert* court's statement that

> "To ensure a sufficient Hispanic concentration within the proposed district, both maps shoot rays out from the northwest and southwest enclaves *to capture additional Hispanic population.*"

Opinion, p. 52. (emphasis in original). See 4th CD Map, Attachment.

C. The "Western Connector"

The district court found that "unless the court completely discounts the 4.7% of the district's population dispersed throughout the western connector, the district is not functionally compact . . . ." Opinion, Appendix, 52, n.48.[4] Further, the lower court found that "portions" of the "western connector" were explainable only on racial grounds.[5] The lower court found that

> "the portion of Stickney township included in the Fourth Congressional District is 81.6% Hispanic and only 14.5% white while the portion of the township allocated to the Third Congressional District is 5.5% Hispanic and 93.2% white. Similarly, in Proviso Township, 57% of the township population included in the Fourth Congressional District is Hispanic and 36.6% is white while the portion of the township included in the Third Congressional District is 4.9% Hispanic and 79.3% white.

Opinion, Appendix, 54-55.[6] Indeed, those portions of the "connector" which contain population, and not vacant park land, cemeteries, or

---

4 See, also, the lower court's comment that within a hypothetical rectangle, "neither the western connector nor the two promontory points jutting out of the district's two core areas fall inside this rectangle." Opinion, Appendix, 52 n.48.

5 The creation of a "connector" of any sort is an act, in itself, that is racially motivated if the objective is to create a majority-minority district, especially here, where the area it encircles is a majority African-American, the 7th Congressional District. *See, Hastert*, at 650. Political manipulation may have been at work, as it is in all districting, but it was not enough for the court to have found that the district was not created on the basis of race.

6 The district court also noted that this connector contains a "significant amount of vacant land, park land, cemeteries and industrial areas . . . to ensure the district's contiguity" which makes it "'hypertechnical[] and . . . cynical'" Opinion, Appendix, 53 n.49, (citing *Hays v. State of Louisiana*, 839 F.Supp. 1188, 1200 (W.D. La. 1993).

industrial land, were drawn on the basis of race. See, Cleveland Test., Appendix, 82; Hispanic Population in Townships in Western Connector, Appendix, 83.

Dr. Taylor, an expert for the Defendant-Intervenors in both the instant case and in *Hastert*, testified in *Hastert* that the "western connector", based upon his review of the change of neighborhoods, would increase in Hispanic population, indicating that the "western connector" was designed to continue to increase Hispanic population. Taylor Test. (*Hastert*), Appendix, 84. In addition, Orestes Aguillon stated in his affidavit, submitted in *Hastert* and part of the record in the instant case, that he made adjustments to the Hispanic map "in order to increase the percentage of the Hispanic population in the Hispanic district." Aguillon Affidavit, Appendix, 85, ¶8. Review of the map suggests that the areas in which there are population, the mapmakers in *Hastert* consistently sought out Hispanic population to create the "connector". The "connector" creates greater uncompactness than either the "raggedness" or "appendages" and, thus, dramatically contradicts the lower court's finding that the 4th CD was narrowly tailored by the *Hastert* court.

D. Violation of Traditional Districting Principles: Splitting of Political Subdivisions.

The lower court found that the 4th Congressional District split a number of political subdivisions: eight (8) townships, eighteen (18) municipalities, including the City of Chicago, twenty (20) aldermanic wards and 218 voting precincts. Opinion, Appendix 54-55. Plaintiff's testimony in the case showed that approximately 21% of the population of the 4th CD lived in a split precincts after the creation of the 4th CD. Population in Split Precincts, Appendix, 88.

In the 4th CD, the splitting of the precincts is particularly telling of the violation of traditional districting principles. Illinois law provides that in Chicago, the election precincts are to "contain nearly as practicable 600 voters". Illinois Compiled Statutes Ch. 10, Sec. 5/11-3 (West 1994). In Cook County, the area surrounding Chicago, the county board is to "divide its election precincts into "election districts so that each shall contain, as near as may be practicable, 500 voters." *Id.* at 5/11-2. The statute provides that when a

legislature creates congressional districts,

> in order to situate each precinct within a single district or ward, the County Board shall change the boundaries of election precincts after each decennial census as soon as is practicable following the completion of congressional and legislative redistricting.

Id. The statute regarding Chicago provides the same. *Id.* at 5/11-3. The statute shows that there is a traditional districting policy that a certain number of persons ought to be maintained within a precinct. But precincts within the "western connector" were split to such low population levels, that the ballot secrecy of at least three Cook County voters was compromised in the 1994 general election for U.S. Representative for the 4th Congressional District. Illinois law provides that voters are entitled to a secret ballot. Illinois Compiled Statutes, Ch. 735, Sec. 5/8-910 (West 1994). These voters whose ballot secrecy was likely compromised, two of whom were in Stickney precinct 40, and one in Proviso precinct 132, can likely be identified by matching the poll books to the canvass of election results. Lewis Test., Appendix, 90; Selected Precinct Election Results, Appendix, 91.

E. Failure to Justify the Rejection of Alternative Remedies.

Before a court can find that a race-based classification is narrowly tailored, it must first consider whether a more race-neutral alternative is available. *City of Richmond v. Croson*, 488 U.S. 469, 109 S.Ct. 706, 729 (1989) citing *U.S. v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 1066 (1987).[7] The record in *Hastert* indicates that maps were submitted by the Hispanic plaintiffs showing that connectors were available on both the eastern and middle sections of the district, without affecting the numerousness of the Hispanic population necessary to constitute a district. Aguillon Affidavit,

---

7 No standard for reviewing alternatives has been adopted by this court; however, the precepts of narrow tailoring itself indicate that the remedy applied shall be "reasonably necessary" to accomplish the objective of the law. *See, Shaw v. Hunt*, ___ U.S. ___, ___ S.Ct. ___ (1996 WL 315870) (strong basis in evidence . . . for concluding that creation of a majority-minority district is *reasonably necessary* to comply with §2. . . .") (emphasis added, citations omitted) *and, Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 481 106 S.Ct. 3019, 3052-53 (Powell, J., concurring).

Appendix, 85, ¶¶7,8; Maps from Aguillon Affidavit, Attachments. The *Hastert* court did not evaluate these districts. *See, Hastert, supra.* Nor did the lower court consider this evidence when it found that the 4th CD was narrowly tailored.

In addition, an alternative was suggested by the lower court, which further indicates that the 4th Congressional District was not narrowly tailored. Consistent with the observation that there may be a divergence between the affected population and the remedy[8] and presuming that the entire population in the 4th Congressional District

---

Footnote 7, con't.

It has been suggested that review and explanation of rejecting other remedies is necessary to conclude that a particular remedy satisfies strict scrutiny. *See, U.S. v. Paradise*, at 200, S.Ct. at 1082 (O'CONNOR dissenting) ("Without any explanation of the available alternatives in the instant case, no such evaluation [whether the claim that the racial quota was necessary] is possible"). Certainly, one factor in evaluating the alternative remedy is to protect the non-minorities. *See, U.S. v. Paradise, supra*, at 199, S.Ct. at 1081 (O'CONNOR dissenting) ("protection of the rights of nonminority workers demands that a racial goal not substantially exceed the percentage of minority group members in the relevant population or work force absent compelling justification.")

8 The lower court asserts that

> "[t]he question raised by *Gingles* is whether the minority population (and not the district drawn to accommodate that population) is geographically compact and sufficiently numerous to constitute a majority in a single member district. This measure of geographical compactness thus concerns whether a Section 2 violation has occurred; the second measure of compactness (*i.e.*, as a traditional race-neutral districting principle) concerns whether the district drawn to remedy the Section 2 violation satisfies the requirements of the Equal Protection Clause. To conflate the two into a single measurement confuses the liability with the damages analysis, and represents an unwarranted extension of *Shaw*."

Opinion, Appendix 64. Indeed, the divergence between the affected population under §2 and the remedial district is a distinction that this Court made in *Shaw v. Hunt*, ___ U.S. ___, ___ S.Ct. ___ (1996 WL 315870). In *Shaw v. Hunt* this Court said that where a remedial district is drawn and it only addresses 20% of the population which has been deemed to have been entitled to a remedy, that percentage is not enough to be considered to have "substantially addressed the §2 violation", leaving open the possibility that a remedial district need not entirely coincide with

is the group entitled to remedy? the district court found that

> a fairly small rectangle can be drawn around the two enclaves on the near northwest and near southwest sides of the city that would include a substantial majority of the Hispanic community's geographic compactness. The Fourth Congressional District, however, would not fit within the area of this same rectangle: neither the western connector nor the two promontory points jutting out of the district's two core areas fall inside this rectangle.

Opinion, Appendix, 52 n.48.

The lower court's assertion that such a hypothetical district exists is further evidence that the *Hastert* court failed to consider another alternative remedy. The failure of the *Hastert* court and the lower court to properly review less irregular remedies points out lack of narrow tailoring by the *Hastert* court and the failure of the lower court to properly apply strict scrutiny.

Footnote 8, con't.

the affected population. *Id.* at ___, S.Ct. at ___. This analysis by the Court in *Shaw II* would only follow upon a finding, however, that there is a geographically compact minority; as where "there neither has been a wrong nor can be a remedy". *Id.* at ___, S.Ct. at ___.

9 The Defendant and Defendant-Intervenors have never introduced evidence that the Hispanics outside the main area of the district in the "connector" were ever subject to violation of §2. If any violation of §2 existed, it was for only those Hispanics in the City of Chicago.

3. Was There a Strong Basis in Evidence for a Federal District Court to Uphold a Racial Gerrymander pursuant to the Equal Protection Clause?

A. "Strong Basis in Evidence" Requires that a Court Find that There Has Been a Violation of Federal Law Before Engaging in Remedial Districting under §2 of the Voting Rights Act.

The Court has recognized the inherent difficulties surrounding the creation of race-based districts when the Court said that "appearances do matter" and race based districting

> reinforces the perception that members of the same racial group - regardless of their age, education, economic status, or the community in which they live - think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible stereotypes. . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

Id. at 2827. (citations omitted); *see, also, Shaw II*, at ___, S.Ct. at ___ ("Significant deviations from traditional districting principles, . . . cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial.")

Consequently, this Court said, in both *Vera* and *Shaw II*, that in order for a race-based districting plan to meet the judiciary's narrow tailoring requirement, the State must present a strong basis in evidence before a court may uphold a race-based district. *See, also Shaw v. Reno*, 509 U.S. 630, 656, 113 S.Ct. 2816, 2832 (1993). In *Bush v. Vera* this Court said

> The State must have a 'strong basis in evidence' for finding that the threshold conditions for §2 liability are present
>
> "first, that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single member district; second, `that it is politically cohesive'; and third `that the white majority votes sufficiently as a

> bloc to enable it . . . usually to defeat the minority's preferred candidate."

Id. at ___, S.Ct. at ___.

A Federal court's obligation to find a "strong basis in evidence," however, is beyond that of a State, insofar as a Federal court must first find that there is a violation of §2. In *Voinivich v. Quilter*, this Court said

> [F]ederal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. . . . Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts to conduct apportionment in the first place.

Voinivich v. Quilter, 507 U.S. 146, 156, 113 S.Ct. 1149, 1156 (1993) *See, also, Growe v. Emison*, 507 U.S. 25, 113 S.Ct. 1075 (1993), *Upham v. Seamon*, 456 U.S. 37, 43, 102 S.Ct. 1518, 1522 (1982) (The limits placed upon a federal court in districting "do not come into play until and unless a remedy is required. . . ."). This same limit is not placed upon the States, which need not find a violation of federal law in order to create §2 districts. *Voinivich*, at 156, S.Ct. at 1156. The reason for this flexibility is suggested by this Court in *Voinivich* which said that "'[s]tates do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law.'" *Id.* (citation omitted). *See also, Missouri v. Jenkins*, ___ U.S. ___, ___, 115 S.Ct. 2038, 2061 (1995) (O'Connor, J., concurring) ("Courts . . . are different. The necessary restrictions on our jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe pallatives for societal ills. The unfortunate fact of racial imbalance and bias in our society, however pervasive or invidious, does not admit of judicial intervention absent a constitutional violation. . . .") *and, Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 362 (1992), *cert. denied* ___ U.S. ___, 113 S.Ct. 2334 (1993) ("Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process.")

Regarding a violation, the Voting Rights Act itself states:

> A *violation* of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class citizens protected by subsection (a). . . .

Voting Rights Act, 42 U.S.C. §1973, Sec. 2(b) (1994), Appendix, 72. In *Gingles* this Court stated "the critical question in a §2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process." *Id.* at 63, 106 S.Ct. at 2773. *See, also, Id.* at 44, 106 S.Ct. 2763.

A violation under the Voting Rights Act is vote dilution. "Redistricting had been used to dilute minority voting power by spreading minority voters throughout different districts or packing minority voters into a single district. . . . It is this problem the Voting Rights Act sought to remedy." *DeWitt v. Wilson*, 856 F.Supp. 1409 (1994), *affirmed*, ____ U.S. ___, ___ S.Ct.____, citing *Shaw v. Reno*, ___ U.S. at ____, 113 S.Ct., at 2823. *See, also, Gingles* at 478 U.S. 30, 46 n.11, 106 S.Ct. 2752, 2764, n.11.

In the instant case, the lower court never reviewed whether a violation existed for which the Hispanics in the City of Chicago, and much less outside of Chicago, were entitled to a §2 remedial district. Nowhere has the lower court cited fragmenting or packing in prior congressional districting plans against Hispanics; indeed, it was never asserted, either in *Hastert* or in the instant case, that Hispanics had the required population prior to 1990. See, Hispanic Population Change 1980-1990, Appendix, 103. Further, the 1981 congressional plan was challenged in *Hastert* primarily because it was malapportioned in light of the results of the 1990 census. *Hastert* at 638.

The lower court recognized that there was no violation to be remedied when it said

> [t]he *Hastert* court therefore set forth to determine which proposed plan *better satisfied* the governing constitutional requirements of population equality, fairness to minority

voting rights (i.e vote dilution), and political fairness . . . .

Opinion, Appendix, 25 (emphasis added). This infers that either plan, both of which contained an Hispanic district in a C-shaped configuration with a western corridor (*See, Hastert*, at 648, n.24), would satisfy constitutional requirements.

The lower court said that *Hastert* addressed a potential violation insofar as the *Hastert* court evaluated the plans submitted by the parties at the time, not by evaluating past violations of §2:

> This inquiry required the [*Hastert*] court to assess whether either of the proposed redistricting plans had the discriminatory effect of diluting the power of minority votes.

Opinion, Appendix, 25. The proof relied upon by the *Hastert* court and cited by the lower court, discussed *infra* at 23, relates to a review of a §2 claim under the "totality of the circumstances", but does not establish that there was a violation itself. *See, Gingles*, at 36-37, 45, 106 S.Ct. 2759, 2763 (totality of the circumstances factors are "probative" and "neither comprehensive nor exclusive"). Therefore, the lower court's assertion that "the *Hastert* court adopted the Fourth Congressional District to remedy a proven Section 2 violation" is clear error. Opinion, Appendix, 68; see, also, Opinion, Appendix, 24.

This Court has suggested in its recent rulings that the Federal judiciary may not engage in creating remedial §2 districts where no violation has been shown. In *Bush v. Vera* the Court said

> [u]nder our cases, the States retain a flexibility that federal courts enforcing §2 lack, both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles, and insofar as deference is to their reasonable fears of, and to their reasonable efforts to avoid, §2 liability.

Id. at p.13. Thus, in the instant case, the lower court was in error to find that there was a strong basis in evidence, in either *Hastert* or the instant case, of a violation of the Voting Rights Act, or any other violation, such that a §2 remedy was necessary.

The lower court suggested that the districting plan ought to be considered less judicial than legislative because of the agreement to create a Hispanic §2 congressional district:

> The pre-trial negotiations and agreements between the diverse parties were highly reminiscent of the compromising which characterizes the legislative process. In fact, if the parties were aligned on partisan political grounds, the alignment would resemble the composition of the state legislature. . . . [T]he partisan alignment supported the reasonable inference that the bi-partisan agreements and stipulations reflected the beliefs of the General Assembly.

Opinion, Appendix, 22, n.21. The lower court's references to the "legislative" process occurring in court because of the agreement of the parties imposes a double-standard upon the Plaintiff, because while it required the Plaintiff to meet specific burdens of proof in challenging the plan precisely because it was court-ordered, it now seeks to call it "legislative," so as to avoid any challenge to its authority to approve it.

B. The Lower Court's Findings of Past Discrimination Fail to Support a Compelling State Interest.

The lower court failed to find a "strong basis in evidence that a remedy was necessary." *Shaw I, supra.* In the instant case, the district court relies upon the factual findings in *Hastert* of (1) racial bloc voting patterns and (2) "prior judicial determinations of past electoral discrimination" to support its conclusion that there was a compelling state interest. The lower court said:

> In this case, the *Hastert* court had a strong basis for finding a Section 2 violation and for adopting a redistricting plan that remedied that violation. In this regard, the *Hastert* court cited with approval prior judicial determination that found a definite pattern and practice of **[1]** electoral discrimination against the Hispanic community in the City of Chicago and the State of Illinois. The *Hastert* court further found that this historical discrimination against the Hispanic community was on-going, most visibly in the **[2]** racial bloc voting that effectively limited the Hispanic community to a disproportionately small number of elected Hispanic officials at the city and state-levels and more subtly in the social and economic discrimination that adversely affected effective political participation and

> representation. Under these circumstances, the creation of an Hispanic majority district advanced the state's compelling interest of remedying past electoral discrimination against Hispanics.

Opinion, Appendix, 66-67. The findings in *Hastert* and the lower court to support this conclusion are, however, insufficient as a matter of law.

Past Electoral Discrimination. For its findings of electoral discrimination, the lower court relied exclusively upon the findings of the *Hastert* court. The *Hastert* court, in turn, relied exclusively upon findings of discrimination in *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir.1984) and *Rybicki v. State Board of Elections*, 574 F.Supp 1082 (N.D.Ill.1982).[10]

In *Rybicki* the court found only generalized or "societal" discrimination against Hispanics:

> poor socio-economic conditions, unemployment, low voter registration and the like afflict both the black and Hispanic communities in Chicago to an extent which may be comparable to that presented in *White v. Regester*.

Rybicki at 1122. Further, there were no findings relating to vote dilution of the Hispanics; this was in large part because a settlement agreement was reached and approved by the court. *Id.* at 1124.

The court in *Ketchum* makes no reference to racial discrimination against Hispanics, with the exception of the failure to prepare election materials in Spanish in 1972 and to rely upon the purported findings of *Rybicki*. *See*, *Ketchum*, at 1406. In *Ketchum* the court refused to make a finding of past discrimination in light of the changes to the Voting Rights Act which made them "superfluous". *Id.* at 1409. Neither the *Hastert* court nor the lower court had any basis for finding, by way of these "prior determinations", that there was a "strong basis in evidence" to engage in remedial districting under §2.

Racial-Bloc Voting. Where there are no sufficient findings of the effects of past discrimination, it would not be sufficient to rely upon racial bloc voting exclusively to justify a race-based classification under the Equal Protection Clause. Thus,

---

10 These cases concern city and state districting, whose districts may no longer be valid pursuant to *Shaw* and its progeny. Thus, these cases carry little weight for the *King* court to have relied upon.

presuming that ethnic bloc voting patterns may exist against Hispanics, an issue which the Plaintiff does not concede, it has been deemed necessary, along with other matters of proof, such as numerousness and compactness, for remedying a §2 violation under *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986).

C. There Was No Compelling Interest to Justify the Fourth Congressional District by way of Other Section 2 Districts

In order to justify the configuration of the Fourth Congressional District, the lower court did not review the Hispanic Fourth Congressional District in isolation. The lower court also reviewed the three African-American Congressional Districts that partially surround the Hispanic Fourth Congressional District. The lower court said that the configuration of the three separate African-American super-majority districts "necessarily affected the boundaries of the Hispanic majority district" and, thus, the *Hastert* court's ostensible compelling interest was to preserve those districts. See, Opinion, Appendix, 51, 70.

The lower court said

> [because] the radical alteration of the three African-American super-majority districts necessarily affected the boundaries of the Hispanic majority district [,] [t]he result was inevitable: a bizarrely drawn Hispanic district whose boundaries were created to maximize its Hispanic population while permitting the African-American super-majority districts with which it shared common borders to maximize their respective African-American populations in order to achieve the desired 65% minority population threshold in each district.

Opinion, Appendix, 51.

Thus, the lower court argued that the Fourth Congressional District was further narrowly tailored by the *Hastert* court because the *Hastert* court "determined that the [Fourth Congressional] district's extraordinary configuration was required to preserve shared communities of interest and protect the three African-American super-majority districts against impermissible retrogression." Opinion, Appendix, 70. Alternative districting plans suggest otherwise. Aguillon Affidavit, Appendix, 85; see, also, Maps from Aguillon Affidavit, Appendix, Attachments. Further, it is clear that

the lower court presumed that there is a compelling state interest in preserving districts other than the Hispanic district as a justification for the Hispanic district. This implies that any change in the 4th CD Hispanic district, even if that district is unconstitutional, would impermissibly affect the surrounding African-American districts.

D. The Lower Court Clearly Erred in Failing to Find, as a Matter of Fact, that Fewer than 50% of the Adult Citizens in the Challenged District in 1990 Were Hispanic.

The lower court committed clear error in finding that there was "'a strong basis in evidence' for finding that the threshold conditions for §2 liability are present. . ." when it found that "[the minority group] is sufficiently large . . . to constitute a majority in a single member district'. Opinion, Appendix, 61. *See, Bush v. Vera*, ___ U.S. ___, ___ S.Ct. ___ (1996 WL 315857). The lower court said that "King has not established via competent evidence that the Hispanic citizen voting age population falls below fifty percent." Opinion, Appendix, 61. The ruling that the Plaintiff has the burden to show that citizenship population of Hispanic falls below 50% is completely unnecessary and onerous, as well as clearly erroneous. The Plaintiff only needs to show that because of the low citizenship rate, it affected the citizens of voting age population such that, although total population may be at 65%, the adult citizens among that population do not exceed 50%.

In *Thornburg v. Gingles* the court said that "*the minority group* must be able to demonstrate that it is sufficiently large . . . to constitute a majority in a single member district." *Id.* at 50, S.Ct. at 2766 (emphasis added). Indeed, where the Voting Rights Act under §2 states "elect[ing] representatives of their choice" is a standard, the focus cannot be on anything other than eligible voters: non-citizens cannot participate in elections, including Chicago. Without a citizen voting age population in excess of 50%, a minority population may not be large enough to control and, thereby "elect representatives of their choice" within a district. And where there are not enough citizen voters, "there neither has been a wrong nor can there be a remedy." *Shaw II*, at ___, S.Ct. at ___.

This Court has not yet ruled upon the citizenship issue as it relates to meeting the threshold factors of *Gingles*. *Johnson v. DeGrandy*,

114 S.Ct. at 2655-56 (1994), *Growe v. Emison*, 113 S.Ct. 1075, 1083 n.4. *But see, Campos v. City of Houston*, 894 F.Supp. 1062, 1065 (S.D. Tex. 1995, appeal pending), *Vera v. Richards*, 861 F.Supp. 1304, 1340 n.49 (S.D. Tex. 1994, *aff'd sub.nom. Bush v. Vera*, ___ U.S. ___, ___ S.Ct. ___ (1996 WL 315857), *Romero v. City of Pomona*, 883 F.2d 1418, 1425-26 (9th Cir. 1989), *Skorepa v. City of Chula Vista*, 723 F.Supp. 1384, 1389 (S.D.Cal. 1989); *contra, LULAC v. North East Independent School District*, 903 F.Supp. 1071, 1084 n.97 (1995). The Voting Rights Act itself expressly protects citizens, mentioning "citizens" in both sections 2(a) and 2(b). *See, Voting Rights Act*, 42 U.S.C. 1973, Appendix, 72.

The only direct evidence of the citizenship characteristics of the 4th CD at the time of its creation came from Chris Cleveland, who testified that no more than 45% of the citizens in the district were of Hispanic heritage. The lower court misstates Mr. Cleveland's testimony. Cleveland testified that 45% of the adult citizens in the 4th CD are Hispanic, ***not*** that 45% of the adult Hispanics in the district were citizens. Cleveland Report, Appendix, 92-93; Cleveland Test., Appendix, 94.

The lower court suggests in footnote 58 that Cleveland's testimony is inconsistent with census data showing 56.3% of all Hispanics in Chicago are citizens. In fact, Mr. Cleveland's testimony was that 56% of all Chicago Hispanics are citizens. Cleveland Test., Appendix, 94. Other evidence at trial confirmed this view, including evidence of the Defendant-Intervenors. See, Al Filo Appendix, 97 (in 1986, 44% of all Chicago Hispanics were ineligible to vote); Latino Institute, Appendix, 95 (59.4% all Illinois Hispanics are citizens); MCIC Table, Appendix, 98 (61% of all Metro Chicago Hispanics are citizens).

Nor is the lower court's consideration of anecdotal evidence regarding citizenship applications sufficient to overcome the fact that only 45% of the district was citizen Hispanic in 1990 and permit the conclusion that more than 50% of the district is now citizen Hispanic. The evidence submitted by the Defendant-Intervenors did not establish that any more than 14,033 persons of Latino background were granted citizenship in the years 1990 through 1994. See, Taylor Report, Appendix, 98. Even if the Plaintiff conceded that all such persons were within the

4th CD, which is not likely the case, 14,033 is 2% of 571,530, the number of persons in the 4th CD at the time of its creation. And this growth in citizenship population among Hispanics does not take into account any influx of non-citizen immigration during the same period.

Further, the lower court considered the submission of evidence on Amnesty programs affecting the citizenship level. The court said "a large number of persons granted amnesty under that Act resided in zip code areas located within the northern and southern areas of the Fourth District. Cleveland's testimony did not compensate for amnesty programs, ..." Opinion, Appendix, 61, n.58. This evidence did not distinguish between Latino immigrants and others, and further, did not mention what is the percentage of persons who may actually receive naturalization status. Lastly, the court suggested that the election of an Hispanic candidate proves that the Hispanic citizen voters are numerous enough within the 4th CD. There was no evidence, however, that Congressman Guitierrez was the preferred candidate of choice of Hispanic voters in the Democratic primaries in 1992 and 1994.

The lower court clearly confused the testimony regarding the percentage of **district citizens who are Hispanic** with census data regarding the percentage of **Hispanics who are citizens**; this, in itself, is clear error. Moreover, where the lower court failed to apply the proper standard of proof upon the Defendants and Defendant-Intervenors in light of the strong inferences raised by the Plaintiff, its failure to find that fewer than 50% of the adult citizens in the 4th CD were Hispanic is clear error.

E. Hispanic Population Was Not Geographically Compact to Justify the Creation of a §2 Remedial District.

The lower court found that the Hispanic population was geographically compact. Opinion, Appendix, 52, n.48, 64. The lower court's example of a hypothetical rectangle to show that Hispanics are compact is a highly unreliable method, since it is applicable to *any* district; a rectangle could as easily be drawn around the population of North Carolina's 12th Congressional District, as well as any other non-compact area.

The Cook County Hispanic population map shows that the 4th CD was drawn to encompass the two areas of the greatest number of Hispanic population in the Chicago area. See, Taylor Report, Map 2: Latino Plurality Block Groups, Appendix, 100. Therefore, where the 4th CD is not compact, it is clear error to find that its population is geographically compact.

Moreover, there are 258,000 persons in the area between what has been referred to as the "two core areas." See, Population Between the "Islands", Appendix, 101. The primary population within that areas was African-American. *See, Hastert* at 646-48. In addition, the evidence of the *Hastert* case shows that a Hispanic district could not be created without using a connector of some sort. See, Maps of Orestes Aguillon, Appendix, Attachments 2, 3, Affidavit of Aguillon, Appendix, 85. Also, the 4th CD Map shows very little Hispanic population around its edges. See, 4th CD Map, Appendix, Attachment.

Again, the lower court failed to apply the proper standard of proof upon the Defendants and Defendant-Intervenors out of deference to the findings in *Hastert*. The lower court relied upon the finding in *Hastert* that the population was geographically compact, in distinction to the lower court's findings on citizenship, which did not rely upon *Hastert*. Opinion, Appendix 64. As discussed above the lower court's deference to the findings of *Hastert* is erroneous. Thus, where the lower court must apply strict scrutiny to determine if the 4th CD was narrowly tailored, and at the same time, held the Plaintiff to an abuse of discretion standard in his proof, the court, in effect, made an erroneous finding as a matter of law on that proof.

CONCLUSION

The treatment of citizens as a racial group, not as individuals, makes race-based classifications subject to judicial strict scrutiny. In *Miller v. Johnson* this Court said that "the Government must treat citizens 'as individuals, not as "simply components of a racial religious, sexual or national class"'" *Id.* at ___, 115 S.Ct. 2486 (1995) (citation omitted). Regarding group rights the Court in *Adarand Constructors, Inc. v. Pena*, ___ U.S. ___, 115 S.Ct. 2097 (1995) said that there is the

> basic principle that the Fifth and Fourteenth Amendments

> to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race - a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,' . . . - should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.

Id. at ___, S.Ct. at 2112-13 (citations omitted). The Court in *Shaw v. Reno* recognized in respect to "group rights" that

> [t]he message that such districting sends to elected representatives is equally pernicious. When a district is obviously created to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Id. at S.Ct. 2827.

Common sense confirms that the 4th CD is bizarre and uncompact. As a matter of policy, without granting a reversal of the lower court, the 4th CD will instill the perception that there is no longer the necessary dedication to protect equality under the law, *for all persons*, and will lend greater authority to group rights and the pernicious divisions that result therefrom. In addition, as a matter of law, the 4th CD is unconstitutional. As a bizarre and uncompact configuration, found by the lower court to be predominantly based upon race, it cannot withstand strict scrutiny and ought to be disbanded.

The Court should note probable jurisdiction. Summary reversal is appropriate for the reasons stated herein. Otherwise the appeal should be set down for plenary review.

Respectfully submitted,

James C. Ten Broeck, Jr.
Counsel of Record
Attorney for Appellant